No. 43157-2-II

THE COURT OF APPEALS

State of Washington

GRANVILLE CONDOMINIUM HOMEOWNERS ASSOCIATION, a Washington non-profit corporation,

Appellant/Cross-Respondent

v.

MICHAEL K. KUEHNER and BRENDA W. KUEHNER, husband and wife,

Respondents/Cross-Appellants

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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ARGUMENT

I. THE KUEHNERS ARE ENTITLED TO ATTORNEY FEES BOTH FOR THE TRIAL PROCEEDINGS AND THIS APPEAL BECAUSE NO STATUTE, CASE LAW, CONTRACT OR LEGAL THEORY OBLIGATES THE KUEHNERS TO PAY GRANVILLE HOA THE ASSESSMENTS DUE TO IT BY THE INGELS.

A. The Kuehners are Entitled to Attorney Fees Pursuant to CR 11 and RCW 4.84.185 Because (1) the Facts of the Case Did Not Give Granville HOA an Action Against the Kuehners; (2) It Was Not Warranted By Existing Law; and (3) Reasonable Inquiry Would Have Revealed the Action to be Baseless.

"The filing of a lawsuit is subject to sanctions [under to CR 11 or RCW 4.84.185] if three criteria are met: (1) The action was not well grounded in fact; (2) it was not warranted by existing law; and (3) the attorney signing the pleading has failed to conduct a reasonable inquiry into the factual or legal basis of the action." *Manteufel v. Safeco Inc. Co. of America*, 117 Wn.App. 168, 176, 68 P.3d 1093, *rev. den'd*, 150 Wn.2d 1021, 81 P.3d 119 (2003). Granville HOA should be sanctioned pursuant to CR 11 and RCW 4.84.185 because neither the Condominium Declaration it filed nor any statute or case law provides that it may bring suit against the Kuehners for the Ingels' unpaid assessments. Reasonable inquiry would have revealed that the only proper actions would have been either against the Ingels for damages, or foreclosing on a lien filed on the Ingels' unit,

upon which Granville HOA would be able to collect rents created by the unit. Because Granville HOA did not bring any such action, and the action it did bring is not proper either under the Condominium Declaration, Washington State statute or case law, the Kuehners should be awarded attorney fees for having to defend against Granville HOA's action.

1. The Condominium Declaration Filed By Granville HOA Did Not Create an Obligation on Behalf of the Kuehners to Pay the Ingels' Unpaid Unit Assessments.

The Condominium Declaration obligates the condominium owner to pay monthly assessments and holds the owner responsible for any nonpayment of such assessments:

> As set forth in Section 16-A above, all assessments, monetary penalties and other fees and charges levied against a unit shall be the personal obligation of the unit *owner's* [sic] of the units at the time the assessments, monetary penalties, or other fees and charges become due.
>
> Each unit *owner* shall be obligated to pay assessments made pursuant to 16-B and C of this declaration to the treasurer of the association.
>
> No unit *owner* may exempt themselves from liability of the payment of assessments, monetary penalties and other fees and charges levied pursuant to the declaration by waiver or non-use of any of the common elements or facilities or by abandonment of his or her unit.
>
> Each monthly assessment, any special assessment, shall be joint and several. Personal debts and obligations of the unit *owner* or *owners*, including contract purchasers of the nits for which the same are assessed, shall be collectable as

such.

VRP Vol. I at 14-16 (emphasis added). Further, pursuant to the Condominium Declaration, tenants are only obligated to pay unpaid assessments out of their rent, again putting the obligation to pay past due assessment fees on the owner of the condominium:

> If the unit is rented the board may collect and the *tenant shall be obligated to pay over to the board so much of their rent* for such unit as is required to pay any amounts due for assessments.

VRP Vol. I at 16 (emphasis added). Thus, the Kuehners, as tenants-at-will, were in no way responsible for the assessment fees under the Condominium Declaration.

2. No statute, case law, or legal theory provides that the Condominium Declaration filed by Granville HOA creates an obligation on behalf of the Kuehners to pay assessments which went unpaid by the Ingels.

The Condominium Act provides that housing associations may only collect rent from tenants occupying units whose assessments have gone unpaid by the unit's owners by filing and foreclosing a lien upon the unit. *See* RCW 64.34.364(10). Granville HOA neither filed a lien, nor foreclosed upon that lien. Under the Condominium Act, therefore, the Kuehners have no obligation to pay Granville HOA the assessments due by the Ingels.

No Washington State court has held that a tenant must pay a condominium unit owner's unpaid condominium assessments. Courts that have considered the issue found that creating such an obligation would lead down a slippery slope. *See Winsor Green Owners Assoc., Inc. v. Allied Signal*, 605 S.E.2d 750 (S.C. Ct. App. 2004) ("[u]nder this rationale, a homeowners' association could directly hold a tenant contractually responsible for assessments, association dues, or any other expenses even though the parties did not intend this result by virtue of entering into a rental agreement.").

3. Reasonable Inquiry Would Have Revealed that Granville HOA's Action Was Baseless, and Would have Revealed the Proper Procedure to Collect Rents in This Scenario.

The Condominium Act provides consistency in the legal administration and management of condominiums. As a result it provides both the proper procedure to collect rents and the proper remedies for nonpayment. RCW 64.34.364(10). The action brought is not only improper under the Act, Granville HOA has presented *no* authority supporting this cause of action. Accordingly, reasonable inquiry would have revealed that the action taken was baseless.

B. The Kuehners are Entitled to Attorney Fees Pursuant to RCW 64.34.455 Because Granville HOA Failed to Bring an Action That Complied With the Condominium Act.

Granville HOA brought suit against the Kuehners for their alleged violation of the Condominium Declaration without following the procedure outlined in RCW 64.34.364(10), the only statute that allows a housing association to bring an action against a tenant. RCW 64.34.364(10) requires that a housing association may only collect rents from a tenant if it forecloses a lien for nonpayment of assessments against a unit and a receiver is appointed to collect those rents. Granville HOA did not file a lien against the unit owned by the Ingels and did not foreclose on that lien, but rather just filed suit against the Kuehners for damages, an action which is not contemplated anywhere in the Condominium Act.

The same subsection of the Condominium Act that provides for an action by Granville HOA against the Ingels for their failure to abide by the Condominium Declaration also provides that the Kuehners may be awarded reasonable attorney fees for Granville HOA's failure to comply with the Condominium Act:

> If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award

> reasonable attorney's fees to the prevailing party.

RCW 64.34.455. Because the action brought by Granville HOA against the Kuehners was not the type outlined in RCW 64.34.364(10), and the Kuehners were adversely affected by having to incur attorney fees in order to defend against Granville HOA improper suit, the Kuehners should be awarded the attorney fees incurred in defending the action.

C. The Kuehners are Entitled to Attorney Fees Pursuant to RAP 18.9 Because Granville HOA Failed to Address the Basis of the Trial Court's Decision and Provided No Grounds for Reversing the Trial Court.

"An appeal is frivolous when there are no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of merit that there was no reasonable possibility of reversal." *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691 (732 P.2d 510 (1987) (citing *Boyles v. Dept. of Retirement Sys.*, 105 Wn.2d 499, 508-09, 716 P.2d 869 (1986); (RAP 18.9(a)). Accordingly, an appeal is frivolous when it fails to address the basis of the trial court's decision. *See id.* at 692. In this case, the trial court found that, pursuant to the Condominium Act and the Condominium Declaration, all obligations owed to Granville HOA were owed by the Ingles – *the owners*. *See* VRP Vol. I at 14-16. So while Granville HOA's appeal declares that the Condominium Declaration, which the Kuehners had constructive knowledge of, requires condominium owners to pay a

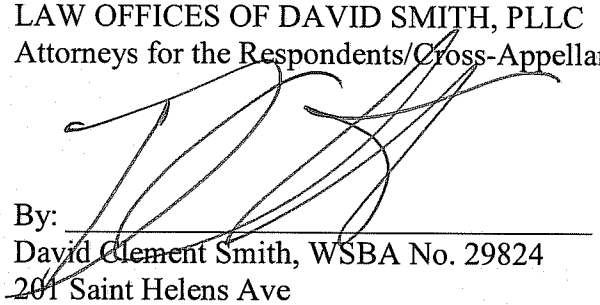
monthly assessment, Granville HOA provides no law supporting its proposition that the Kuehners, as *tenants-at-will*, are liable for the payment of such assessments. As Granville HOA has provided no grounds for reversing the trial court, the appeal is frivolous and attorney fees should be awarded.

CONCLUSION

The Kuehners are entitled to attorney fees both for the trial proceedings and this appeal because no statutes, case law, contract or legal theory obligates the Kuehners to pay Granville HOA the assessments due to it by the Ingels.

Respectfully submitted this 19th day of October, 2012.

LAW OFFICES OF DAVID SMITH, PLLC
Attorneys for the Respondents/Cross-Appellants



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DECLARATION OF SERVICE

I, David C. Smith, hereby certify under penalty of perjury under the laws of the state of Washington, that the following is true and correct:

On October 19, 2012, I delivered a true and accurate copy of this document via e-mail to Thomas G. Krilich, attorney for appellant/cross-respondent.

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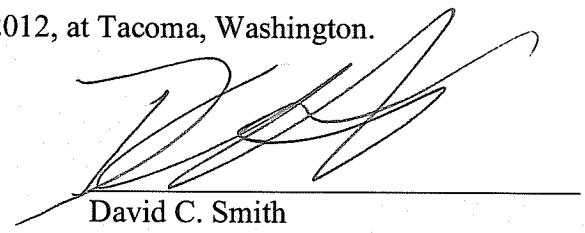

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